91 *U. S.* 367, 376; *Moore* v. *U. S.* (1875) 91 U. S. 270; *Railroad* v. *Baugh* (1892) 149 U. S. 368. Accordingly, there is no difficulty in holding that interstate carriers, although set apart from state control, are nevertheless set over to federal control still subject to the rules of common law, *Murray* v. *Chicago & N. W. Ry. Co., supra;* and see *Western Union Tel. Co.* v. *Call Pub. Co., supra,* and the decision of the principal case, if understood to be an application of federal law, and not of state law is correct both in principle and by authority. The fact that the remedy is granted in a state court cannot be objected to, since the state courts in the absence of a constitutional or Congressional prohibition have full jurisdiction over cases arising under the federal constitution and laws, *Murray* v. *Chicago & N. W. Ry. Co., supra,* 43, and in this instance no such prohibition appears.

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DISPOSAL OF PUBLIC LANDS BY LEASE.—Estates for years are a comparatively late development in the law of real property. Challis, Real Property * 46. Probably their origin was due, not to the demands of husbandry, 2 Blackstone's Commentaries * 141, but to the requirements of commerce. II Pollock & Maitland, History of English Law, 113. The phrase "chattel real" in the middle ages covered, in addition to estates for years, "a whole group of rights," which were treated as vendible and bequeathable for an "economic reason," *viz.,* "the investment of capital." These estates were naturally influenced by Roman law. II Pollock & Maitland, 115. A lease for years, in principle, amounts to a *locatio-conductio rei,* or bailment for hire, an expression "in the Roman and Continental law equally applicable to real estate or immovable property, and to incorporeal hereditaments." Story, Bailments § 373. The essential law of these interests, introduced to meet the developing requirements of commercial life, paralleled the law of bailments; the use of the property was let for hire, with a right to receive back the *corpus* substantially undiminished in value—the right to a "reversion," which is not a real reversion, however, for the lessee's seisin is considered that of his lessor, and the latter does not part with his freehold. The disability of the lessee to diminish the value of the "reverting" *corpus* is tempered by exceptions, presumably because of the general nature and necessities of the occupancy of land; he may cut wood for fuel and repairs, may cut or graze grass, and, curiously, may work open mines even to exhaustion. But apart from such well-defined exceptions as are instanced, the main rule appears clear—that an essential right enjoyed by the lessor for years is to have returned to him the *corpus,* substantially unimpaired. And, because of the commercial character of these estates, the better view would seem to be that this *corpus* is not the land valuable as a unique thing, *i. e.,* valuable merely as a site, but the land valued as a commercial asset. As to personal property, an agreement which transfers the use, if the identical goods are not to be returned, is normally not a bailment, but a sale. *Wilson* v. *Finney* (N. Y. 1816) 13 Johns. 358; *Hurd* v. *West* (N. Y. 1827) 7 Cow. 756; *Carpenter* v. *Griffin* (N. Y. 1841) 9 Paige, 310. So the release of a tenant of land for years from his duty to give up the property unimpaired in value at the end of his term converts the lease, to that extent, practically into a sale to the tenant of so

much of the property as he is allowed to waste, as it vests in him the essential attribute of ownership—uncontrolled and exclusive dominion. And, if the exemption of the lessee from liability for waste extends not merely to a part of the land, but to practically the whole of the *corpus*—the land as a commercial asset—the instrument must be classified by its main, rather than by its incidental, operation and effect. In such a case, then, the instrument is preferably termed, not a lease, but a sale; the lease contained in the instrument being merely incidental to its principal purpose, that of making a sale of the substantial body, the *corpus,* the land as a business asset.

In Minnesota, the state constitution provides that "no portion of" school lands "shall be sold otherwise than at public sale." A statute was passed authorizing the land commissioner, on payment of a fee, to issue a license allowing the holder to enter on land therein described and prospect for ore by sinking test pits, with a right to receive, on his application within one year, a mining lease for fifty years, under which a minimum and contingent royalty was to be paid. But this statute did not provide for the public sale of these "leases;" and the state attacked their validity on the ground that they were really "sales" not made publicly, as required by the constitution. The court held them valid as leases. *State* v. *Evans* (1906) 108 N. W. 958.

The grant of minerals on land, *Caldwell* v. *Fulton* (1858) 31 Pa. 475, or the equivalent right to sink mines to obtain them, has been held to constitute a sale—though called a lease—not only in cases where the time for removal of the ore was unlimited, *Sanderson* v. *Scranton* (1884) 105 Pa. 469; *Blakley* v. *Marshall* (1896) 174 Pa. 425, but also where the time of removal was limited, *Kingsley* v. *Coal Co.* (1891) 144 Pa. 613; *Plummer* v. *Coal Co.* (1900) 104 Fed. 208, although in the latter case there is apparently a sale of an estate on condition subsequent. *Lazarus's Estate* (1891) 145 Pa. 1; Barringer & Adams, Mines, 36. Also, "leases" under which payments are made in the form of royalties, provided there be a minimum royalty payable in any event, as in the principal case in Minnesota, have been held to be sales, *Lazarus's Estate, supra; Stoughton's Appeal* (1878) 88 Pa. 198; *Timlin* v. *Brown* (1893) 158 Pa. 606; or even where the royalty is contingent, *Wilmore Coal Co.* v. *Brown* (1906) 147 Fed. 931; especially if title has passed to some coal by its being mined. *Hook* v. *Garfield Coal Co.* (1900) 112 Ia. 210. Accordingly, the decision of the Minnesota court seems questionable. A more correct result has been reached in a recent case in Mississippi, *Moss Point Lumber Co.* v. *Board of Supervisors* (1906) 42 So. 290, where the code had provided for leases of school lands by county supervisors, but had not provided for sales of such lands. The supervisors brought this action to enjoin from waste a lumber company which was the assignee of a 99-year term of timber lands leased under provisions of the code, the lumber company having declared its intention to cut and sell the trees on the land. The injunction was granted, with one dissent. All the court agreed that the claim of the lumber company of a right to strip the land of timber amounted to a claim that its lease constituted a sale to it of "a fee determinable at the end of 99 years," and the only point of difference was whether

this claim could be supported. The decision was placed on the grounds not only that the supervisors intended to convey only a leasehold estate, with no more than the usual rights of such an estate, but also that the supervisors did not, under the code, in any event, have the power to grant anything more than a leasehold estate.

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THE CONSIDERATION IN ANTE-NUPTIAL CONTRACTS.—At common law, all existing obligations between husband and wife were extinguished by the marriage, *Long* v. *Kinney* (1874) 49 Ind. 235; *Butler* v. *Butler* (1885) L. R. 14 Q. B. D. 831, and hence marriage settlements between them were unenforceable. For this reason equity took jurisdiction, *Johnston* v. *Spicer* (1887) 107 N. Y. 185, and the fact of marriage in reliance on the agreement was sufficient consideration for its complete enforcement, *Hobson* v. *Trevor* (1723) 2 P. Wms. 191; *Matter of Young* (1882) 27 Hun 54, aff'd. 92 N. Y. 235, by either of the contracting parties or their children, *Newstead* v. *Searles* (1837) 1 Ark. 265; *Michael* v. *Morey* (1866) 26 Md. 239; and see 39 Sol. J. 789, 802; but seemingly no inquiry was made as to whether or not there had been a previous engagement. *Matter of Young, supra; Crostwaight* v. *Hutchinson* (Ky. 1811) 2 Bibb 407. Where the settlement was by deed purporting to vest an estate either in law or equity, *Newstead* v. *Searles, supra*, this was perfectly good in principle, as it was plain that no resulting trust could have been intended; 3 Pomeroy, Eq. Jur. § 981; 6 COLUMBIA LAW REVIEW 329, 330; and the future born children were sufficiently interested as not to be classed as volunteers. Even under the Stat. 27 Eliz. c. 4, concerning voluntary conveyances, such a result could be supported on the ground of statutory construction. *Maguire* v. *Thompson* (1833) 7 Pet. 348; 39 Sol. J., *supra*. But where the settlement contained executory covenants, a further inquiry should have been made, as equity required the same consideration to enforce a promise under seal, as law required to enforce a simple promise. *Jefferys* v. *Jefferys* (1841) Craig & P. 138; *Burling* v. *King* (N. Y. 1873) 66 Barb. 633; *Estate of Webb* (1875) 49 Cal. 541.

In a recent case this distinction was disregarded by a closely divided court. In contemplation of plaintiff's marriage, his father, in a covenant to which plaintiff, his intended bride, a Russian noblewoman, and her parents were parties, covenanted to leave at his death to the bride and plaintiff each, one-fourth of his estate. He made a will in execution of the covenant, but later by a codicil left the plaintiff's share to defendant in trust for plaintiff. Defendant being in possession under decree of the surrogate, plaintiff brings this action for specific performance. The court, relying on chancery precedent, and on some English cases at law, bad in principle, but strongly protesting that there was consideration, decreed specific performance. *Phalen* v. *United States Trust Co.* (1906) 186 N. Y. 178.

Although this case does not present the common law difficulty of extinguishment of obligations between husband and wife, yet if the agreement is based on good consideration it provides a case for equitable interference. *Parsell* v. *Stryker* (1869) 41 N. Y. 555. Where a party has already contracted to perform a certain act, neither the performance of that act, *Stilk* v. *Myrick* (1809) 2 Camp. 317, nor a promise to perform it, *Bartlett* v. *Wyman* (N. Y. 1817) 14 Johns. 260, can